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No. 10-344

In the Supreme Court of the United States

ALONSO ALVINO HERRERA,

Petitioner,

v.

STATE OF OREGON,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals of the State of Oregon

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner's position rests on three main arguments:

1. As this Court has repeatedly stated, the Jury Trial Clause requires unanimous convictions in federal criminal cases.

2. As this Court concluded in *McDonald* v. *City of Chicago*, 130 S. Ct. 3020 (2010), incorporated Bill of Rights provisions apply to States the same way they apply to the Federal Government.

3. Therefore, state criminal convictions must be unanimous as well, and *stare decisis* does not preclude this Court from so holding, despite the contrary, badly splintered decision in *Apodaca* v. *Oregon*, 406 U.S. 404 (1972).[1]

The State's responses to these arguments are unsound. First, the State argues—contrary to this Court's statements—that the Jury Trial Clause does not require unanimity at all. Second, the State fails to acknowledge that the *McDonald* plurality (explicitly) and the *McDonald* concurrence (by necessary implication) repudiated the foundation for the *Apodaca* result, and for the *Apodaca* controlling opinion. Third, the State argues that *stare decisis* mandates adherence to *Apodaca*, but does not confront this Court's conclusions that outlier decisions (such as *Apodaca*) do not merit much *stare decisis* weight.

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[1] The petition also argues that this Court's review is warranted because state courts cannot revisit this issue in light of *McDonald* until this Court acts. Pet. 25–27. The State does not disagree on this.

I. The State Errs In Denying That The Jury Trial Clause Requires Unanimity For Conviction

The State suggests the Sixth Amendment itself does not require jury unanimity, even in federal cases. "[O]ne of the features of the common-law jury that the Framers did not intend to include in the Sixth Amendment was the requirement of a unanimous jury verdict." Br. in Opp. 12.

In this, the State rejects this Court's repeated conclusions that the Sixth Amendment does require jury unanimity. In *Andres* v. *United States*, 333 U.S. 740, 748–49 (1948), this Court concluded that "[u]nanimity in jury verdicts is required" under the Sixth Amendment. In *Patton* v. *United States*, 281 U.S. 276, 289–90 (1930), this Court stated that "the requirement of unanimity" is "embedded" in the Jury Trial Clause. In *Swain* v. *Alabama*, 380 U.S. 202, 211 (1965), overruled on other grounds by *Batson* v. *Kentucky*, 476 U.S. 79 (1986), this Court stated that "the system followed in the federal courts by virtue of the Sixth Amendment" requires that jurors "unanimously agree on a verdict."

In three cases around 1900, this Court considered whether the right to trial by jury applied against the governments of continental Territories, insular possessions, and States. In all three cases, this Court treated jury unanimity as mandated wherever the Sixth Amendment applies. See *Thompson* v. *Utah*, 170 U.S. 343, 349–51 (1898) (concluding that the Sixth Amendment, and therefore the unanimity requirement, applies to continental Territories), overruled on other grounds by *Collins* v. *Youngblood*, 497 U.S. 37, 47 (1990); *Maxwell* v. *Dow*, 176 U.S. 581, 583–84 (1900) (stating that the Sixth Amend-

ment does not apply to States, but includes a unanimity requirement when applied to the federal government); *Hawaii* v. *Mankichi*, 190 U.S. 197, 211–12 (1903) (suggesting, citing *Thompson*, that various aspects of the Sixth Amendment do not apply to insular possessions, though the Sixth Amendment does include a unanimity requirement when applied to the federal government).

In *Williams* v. *Florida*, 399 U.S. 78, 91–92 (1970), this Court abrogated *Patton*, *Thompson*, and *Maxwell* as to their conclusion that federal criminal trials must use 12–member juries, but expressly declined to consider those cases' conclusion about the unanimity requirement, *id.* at 100 n.46. And two years later, in *Apodaca*, a majority of the Justices concluded that the Sixth Amendment does require a unanimous verdict for federal convictions, expressly reaffirming *Patton*, *Thompson*, and *Maxwell* on that score. 406 U.S. at 369–70 (Powell, J., concurring in the judgment); *id.* at 380–83 (Douglas, J., joined by Brennan & Marshall, JJ., dissenting); *id.* at 414–15 (Stewart, J., joined by Brennan & Marshall, JJ., dissenting).

Finally, in *McDonald*, both the plurality and Justice Stevens specifically acknowledged that "the Sixth Amendment right to trial by jury requires a unanimous jury verdict in federal criminal trials." 130 S. Ct. at 3035 & nn.13, 14; *id.* at 3094 (Stevens, J., dissenting).

The State's challenge to this well-settled rule errs in five related ways.

1. The State repeatedly and mistakenly ascribes to "this Court" the *Apodaca* plurality's view that the Sixth Amendment does not require unanimity. Br. in

Opp. 4, 11, 12, 13. In fact, a majority of this Court's members rejected that position in *Apodaca*.

2. The State does not mention any of the 1790s and 1800s commentators—including St. George Tucker, Joseph Story, and Thomas Cooley—whom the petition cited to show that the constitutional right to trial by jury was historically understood as requiring unanimity to convict. Pet. 13–15, 21.

3. The State argues, relying on the *Apodaca* plurality's minority position, that the drafting history of the Jury Trial Clause suggests the First Congress deliberately rejected a unanimity requirement. Br. in Opp. 11–12. As the petition noted (at 15–16), James Madison's original draft of the Jury Trial Clause provided for a jury trial "with the requisite of unanimity for conviction, * * * and other accustomed requisites," 1 Annals of Cong. 452 (1789), but Congress ultimately omitted the quoted clause.

There are two alternative inferences from this omission. One is that the unanimity requirement was omitted because it was "thought already to be implicit in the very concept of jury." *Apodaca*, 406 U.S. at 409–10 (plurality opinion). This would be consistent with the view of five Justices in *Apodaca*. The other position, endorsed by only the four Justices in the *Apodaca* plurality, and now urged by the State, "is that the deletion was intended to have some substantive effect." *Id.* at 410.

"It is always perilous to derive the meaning of an adopted provision from another provision deleted in the drafting process." *District of Columbia* v. *Heller*, 128 S. Ct. 2783, 2796 (2008). This is so precisely because the revision is often ambiguous. Even the State acknowledges that, under its understanding of

the drafting history, "the historical record can lead to competing conclusions." Br. in Opp. 11.

But when the drafting history is ambiguous, the ambiguity can only be resolved by looking at the historical record more broadly. One historical source consists of the 1800s constitutional commentators who considered that record. This is why the Justices of this Court have repeatedly turned to the commentators the petition relies on, especially Tucker, Story, and Cooley. See, *e.g.*, *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 799 (1995); *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in the judgment); *E. Enters.* v. *Apfel*, 524 U.S. 498, 547 (1998) (Kennedy, J., concurring in the judgment and dissenting in part); *Harmelin* v. *Michigan*, 501 U.S. 957, 982 (1991) (Scalia, J., joined by Rehnquist, C.J.); *Heller*, 128 S. Ct. at 2811; *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995). (Tucker published his treatise only 12 years after the Bill of Rights was ratified, and Story received his legal training in the 1790s.) Those commentators' views resolve any ambiguity that there might be here: The Sixth Amendment was originally understood, and has since been understood, as requiring unanimity for criminal conviction.

Another source to consult when "[t]he Constitution's text does not alone resolve th[e] case," *Crawford* v. *Washington*, 541 U.S. 36, 42 (2004), is "the historical background of the Clause," *id.* at 43. See also *Yeager* v. *United States*, 129 S. Ct. 2360, 2365 (2009) (noting approvingly that most of this Court's decisions interpreting the Double Jeopardy Clause "have found more guidance in the common-law ancestry of the Clause than in its brief text"). This is why the petition (at 13) discussed Blackstone's expli-

cation of the meaning of the trial by jury, as well as Justice James Wilson's historical discussion of the trial by jury. Those analyses—which the State likewise does not confront—confirm that unanimity was seen in the Framing era as an essential element of the "right to a * * * trial, by an impartial jury."

4. The State argues, citing the minority view in *Apodaca*, that all the possible "explanations * * * for the development of unanimity" "are either outmoded or historical accidents." Br. in Opp. 13. Petitioner doubts such an argument could justify departing from historically understood constitutional conclusions. But in any event, the State fails to discuss the clearest and most authoritative explanations for the Framers' retention of unanimity—the explanations offered by James Wilson, one of the drafters of the Constitution and one of the founding Justices of this Court, who was writing at the very time the Bill of Rights was being ratified (1790–91).

As the petition noted (at 18–20), Justice Wilson gave two related reasons for the unanimity requirement. To begin with, the unanimity requirement assures especially strong protection against wrongful conviction. "[I]t would be difficult to suggest, for [the defendant's] security, any provision more efficacious than one, that nothing shall be suffered to operate against him without the unanimous consent of the [jury]." 2 JAMES WILSON, WORKS OF THE HONOURABLE JAMES WILSON 316 (Philadelphia, Lorenzo Press 1804) (reprinting lectures delivered in 1790–91) (available in Google Books). Together with other protections, the unanimity requirement helps "innocence * * * be secure," 2 *id.* at 317, and "effectually protect[s]" the accused "from the concealed and poi-

soned darts of private malice and malignity," 2 *id.* at 351.

Moreover, the unanimity requirement minimizes the risk that a conviction would stem from undue sympathy by the jury, which is drawn from the people, towards the prosecution, which is brought on behalf of the people. In a criminal prosecution, "on one side [is] an individual—on the other, all the members of the society except himself—on one side, those who are to try—on the other, he who is to be tried." 2 *id.* at 315. This means that the jurors "are not indifferent, and, consequently, may not be impartial." *Ibid.*

Because of this, Justice Wilson explained, "the evidence, upon which a citizen is condemned, should be such as would govern the judgment of the whole society," *ibid.*, meaning evidence that all reasonable members of society should accept as dispositive. To provide some assurance of this, "we may require the unanimous suffrage of the [jury], as the necessary and proper evidence of that judgment." *Ibid.* There is nothing "outmoded" or "medieval," Br. in Opp. 13, about these rationales, or about the unanimity requirement.

5. Finally, the State argues (at 11) that "not all features of the common-law jury are included in and guaranteed by the Sixth Amendment," pointing as an analogy to this Court's approval of 6–member juries. *Williams* v. *Florida*, 399 U.S. 78 (1970). The petition discusses (at 16–21) why the unanimity requirement is an essential feature of the right to trial by jury, even if the 12–member size is not. Here petitioner briefly notes some specific differences between these requirements.

First, there is reason to think the Framers would have treated the unanimity requirement as more essential to the criminal jury than the traditional size. In particular, James Wilson stressed the importance of the criminal jury unanimity requirement at length, but dismissed the importance of the particular size of the jury. 2 WILSON, *supra*, at 305–68.

Second, American law since the Framing has treated the unanimity requirement as more essential to the criminal jury than the traditional size. Only two states allow nonunanimous juries in cases to which the Jury Trial Clause applies (*i.e.*, all cases except petty offense cases, in which the maximum penalty is six months or less, Pet. 3 n.1). Yet at least twenty states allow juries with fewer than 12 members in at least some cases to which the Jury Trial Clause applies. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 2004, at 233–36, http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1204. The presence or absence of a "near-uniform judgment of the Nation provides a useful guide in delimiting the line between those jury practices that are constitutionally permissible and those that are not." *Burch* v. *Louisiana*, 441 U.S. 130, 138 (1979).

Third, this Court's opinions have treated the unanimity requirement as more essential to the criminal jury than the traditional size. As was mentioned above, the constitutional rule for federal trials continues to be that unanimity is required and the 12–member size is not.

Fourth, this historical difference in treatment is based on a logical and functional difference. The number twelve is one of several equally reasonable places to set the jury size. There can be no logical dif-

ference in kind between a jury of twelve and, for instance, a jury of eleven or thirteen.

But a unanimous verdict is logically quite different from an 11–1 verdict or a 10–2 verdict: The nonunanimous verdicts demonstrate that at least one presumptively reasonable juror perceived a reasonable doubt about the defendant's guilt. Conversely, a unanimous verdict has moral force that a nonunanimous one cannot have: "Can the voice of the state [in criminal prosecutions] be indicated more strongly, than by the unanimous voice of * * * [the] jury?" 2 WILSON, *supra*, at 350. The powerful empirical evidence cited by *amici* in favor of the unanimity requirement simply buttresses what Anglo-American legal traditions, from before the Framing to the present, have long recognized.

II. The State Does Not Confront The Inconsistency Of *Apodaca* With *McDonald*

This Court in *McDonald* rejected the mode of analysis that produced the *Apodaca* result, and that undergirded the *Apodaca* controlling opinion. See Pet. 5–11. The plurality opinion repeatedly stressed that incorporated Bill of Rights clauses apply equally to the state and federal governments, and Justice Thomas's concurrence implicitly accepted the same principle in its analysis. Pet. 5–7. This is directly contrary to the *Apodaca* result, and to the reasoning of the controlling *Apodaca* opinion.

Moreover, the *McDonald* plurality noted that its approach was inconsistent with *Apodaca*:

> [The *Apodaca*] ruling was the result of an unusual division among the Justices, not an endorsement of the two-track approach to in-

> corporation. * * * *Apodaca* * * * does not undermine the well-established rule that incorporated Bill of Rights protections apply identically to the States and the Federal Government.

130 S. Ct. at 3035 n.14 (citations omitted). That *Apodaca*'s "two-track" approach does not undermine *McDonald*'s "apply identically" approach means that *McDonald* does undermine the *Apodaca* approach.

The State argues that, "beyond noting that *Apodaca* 'was the result of an unusual division among the Justices,' [*McDonald*], the Court has not questioned *Apodaca*." Br. in Opp. 7. But *McDonald*'s rejection of the very reasoning on which *Apodaca*'s controlling opinion rested does cast *Apodaca*'s logic into "question[]."

The State also argues that *Apodaca* should not be revisited because "the incorporation test has not changed since that decision," Br. in Opp. 18–19. See also *id.* at 17 ("[i]n *McDonald*, the Court did not alter the incorporation test"); *id.* at 5.

But the *Apodaca* controlling opinion, and therefore the *Apodaca* result, rests on a particular conclusion about incorporation—that incorporated Bill of Rights provisions may mean something different with regard to the states than with regard to the federal government. *McDonald* rests on the opposite conclusion. *Apodaca* departed from earlier holdings. Pet. 6–7. *McDonald* returned to those holdings. *Apodaca* cannot be reconciled with *McDonald*.

III. *Apodaca* Should Not Be Given Substantial *Stare Decisis* Weight

Petitioner does agree, however, with the State's statement that "[t]he rule that incorporated Bill of Rights provisions apply equally to the States and the Federal Government was well established at the time of *Apodaca*," Br. in Opp. 17, and that *McDonald* is consistent with that rule, *ibid.*

With that statement, the State makes petitioner's argument for him. *Apodaca* is a constitutional outlier, a brief departure from a firmly entrenched constitutional rule. This Court has repeatedly concluded that such constitutional outliers do not deserve much *stare decisis* weight.

To borrow from those conclusions, *Apodaca* was "an 'aberration' insofar as it departed from the robust protections we had granted [incorporated constitutional rights] in [this Court's] earlier cases." *Citizens United* v. *FEC*, 130 S. Ct. 876, 921 (2010) (Roberts, C.J., concurring). "Remaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following a more recently decided case inconsistent with the decisions that came before it; the latter course would simply compound the recent error * * *." *Adarand Constructors, Inc.* v. *Pena*, 515 U.S. 200, 231 (1995). *Apodaca* "lacks constitutional roots. The ['watered-down incorporation'] rule it announced is wholly inconsistent with earlier Supreme Court precedent * * *." *United States* v. *Dixon*, 509 U.S. 688, 704 (1993).

Apodaca ought to be "overruled" because it "stands as an anomaly in the jurisprudence * * * of constitutional law," *College Savings Bank* v. *Florida*

Prepaid Postsecondary Education Expense Board, 527 U.S. 666, 680 (1999), and because it is "inconsistent with the basic rationale of [a longer] line of cases," *Lapides* v. *Board of Regents*, 535 U.S. 613, 623 (2002). *Apodaca* and *McDonald* "are irreconcilable"; this Court's incorporation "jurisprudence cannot be home to both," *Ring* v. *Arizona*, 536 U.S. 584, 609 (2002)—especially given the State's acknowledgment that this Court's other past precedents are on *McDonald*'s side.

The petition explains further why *Apodaca* does not merit much *stare decisis* weight. See Pet. 27–33. This subsection simply stresses the State's admission that *Apodaca*'s two-track approach to incorporation is a total constitutional outlier.

CONCLUSION

For these reasons and those given in the petition (and supported by the briefs of *amici*), the petition for a writ of certiorari should be granted.

Respectfully submitted.

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